Order Construction Company, Inc. *and* Milton Ray Cobb. Case 9–CA–26753

August 22, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 8, 1991, Administrative Law Judge Hubert E. Lott issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following inadvertent error in the judge's decision. The date the Charging Party, Milton Ray Cobb, received his first paycheck was July 20, not July 15, 1989.

[2] Assuming arguendo that some of Cobb's conduct constituted protected concerted activity, we conclude, on the basis of the record before us, that the General Counsel has not established by a preponderance of the evidence that the discharge was unlawfully motivated.

Deborah Jacobson, Esq., for General Counsel.
Karen Hamrick, Esq., of Charleston, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard in Charleston, West Virginia, on December 21, 1989.[1] Upon an unfair labor practice charge filed on August 23 by Milton Cobb (Cobb) against Orders Construction Company, Inc. (Respondent) and on a complaint issued by General Counsel on October 6.

The issue in this case is whether or not Respondent discharged Cobb for engaging in union or concerted activities.

Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing briefs have been received from the parties.

[1] All dates refer to 1989 unless otherwise indicated.

On the entire record and based on my observation of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in St. Albans, West Virginia, where it is engaged as a contractor in the building and construction industry.

During 1989, Respondent, in the course and conduct of its operations, purchased and received at its St. Albans, West Virginia facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of West Virginia.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that the United Steelworkers of America, Local 14614, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company and Union have had an amicable relationship for over 16 years. For most of its construction jobs including the Capital High School project in Charleston, West Virginia, the Company obtains workers through the local union hiring hall. Cobb has been a union member for 11 years. He was hired by Orders on July 11 and discharged on July 31, during his probationary period.

The overtime provision in the contract requires the company to pay time and one-half for all hours worked in excess of 10 in a single day. The contract further provides that the daily overtime provision may be modified by mutual consent between the Company and the Union. In the past, and on the Capital High School project, the Union has taken the position that if the employees unanimously agree to a change in the overtime provision, it will not object to its implementation.

The showup time (weather) provision in the contract calls for 2 hours work if an employee reports for work or 2 hours pay if work is not available. However, this provision does not apply if in the opinion of the Company, weather conditions prevail which make it unsuitable to start work or necessary to stop work. The evidence supports the Company's position that it has never paid showup time when it hasn't requested an employee to remain on the job in inclement weather.

B. *General Counsel's Evidence*

Milton Cobb began work on July 11. On that day he testified that he was assigned the job of flagging. He complained to Project Superintendent James Browning that he had a bad back and if flagging was all the work they had for him, he would go home. On July 15 he received his paycheck and complained to Foreman Kenneth Parkins that he was short 1 hour overtime for July 12 and 1 hour of pay for July 13 and July 14 when he was sent home because it was raining. Parkins told Cobb that if he was complaining about showup time, he would send him home in a drizzle. Sometime later Cobb talked to Union President Ed Overby who told him that

all time over 10 hours a day or 40 hours per week is paid at the overtime rate. But he (Cobb) shouldn't say anything because he was a probationary employee and the Union couldn't help him if he complained.

The week of July 19 there was a meeting of all employees with Parkins and Browning. According to Cobb, Browning said he had a meeting with Overby and was told by Overby that it was alright if the employees worked straight time up to 40 hours per week. Cobb told Browning that he didn't believe Overby had the authority to say that and he would like to see it in writing or have Overby tell him. According to Cobb, he and Browning had an understanding that nothing was agreed to.

The next day (Thursday) Cobb and some other men were sent home because of bad weather. Others stayed on the job. Cobb complained about being sent home, telling Browning that he would never get overtime pay because he never worked over 40 hours per week. Browning said that he never saw anyone like Cobb and Cobb replied, ''We could be friends or enemies, that I wanted my money.'' That if he didn't get overtime and showup pay he would fight him all the way.

On Monday, July 31, Cobb was discharged by Browning. He was not given a reason because he was probationary. Cobb called Browning, ''a low-life, chicken shit, son-of-a-bitch.''

On cross-examination, Cobb admitted that he did not complain about his wages for the week ending July 27 because he worked 45 hours that week. He complained to Browning and Parkins on July 14 and July 20 that he should have been paid for 1 hour he was at work before being sent home because of rain. On July 17, Cobb knew he was being paid straight time for a 12-hour-per-day shift.

Cobb didn't remember any safety meeting held on July 17 wherein all the employees voted to work a 12-hour shift at straight time. He didn't remember voting or any discussion of overtime but he did remember talking to Browning that day about overtime although he didn't remember what he said to Browning. Cobb admitted that on July 26, Overby explained the overtime policy to him, i.e., men could work 12 hours per day straight time if all the men agreed. He also admitted that he was unaware of any showup time (inclement weather) provision in the contract. Cobb never talked about or filed a grievance concerning overtime or the bad weather policy.

Employee W. D. Miller testified that one day at breaktime the crew was discussing overtime. They believed they were supposed to get time and one-half for all overtime. Cobb stated that he knew that they were supposed to get overtime. The next day there was a meeting held with Browning and Parkins where the employees discussed overtime and Cobb stated that he wanted overtime for hours worked over 10 per day and he did not agree to work a 12-hour shift at straight time. Sometime after the meeting, he overheard Cobb telling Browning he didn't think it (12-hour shift) was going to work out the way they thought, and he (Cobb) wanted time and one-half for all hours worked over 10 per day.

Union President Overby testified that he had inquiries from Cobb about the overtime policy at Orders and about not being paid for showup time. Overby told him to continue working, not to cause any problems, and he (Overby) would take care of it. He also told Cobb that there was no guaranteed 2 hours on rainouts. Three or four days later Area Manager Aubrey Bowles called Overby stating that there were problems concerning premium pay on the Capital High project. Overby told him the contract called for daily overtime for all hours worked over 10 per day, but that contract provision could be waived if all the employees on the job agreed. After Cobb was discharged, Bowles told Overby Cobb was terminated because of his attitude.

C. *Respondent's Evidence*

Bowles, Browning, and Parkins testified that the first day on the job, July 11, Cobb asked how long the job would last. When he was told, he said good because he wanted off during hunting season. On that same day he was assigned flagman duties. Cobb complained that he couldn't do that job because of a bad back and if that was all they had for him, he would go home. Browning told Bowles, who in turn called Overby informing him that he couldn't use Cobb under those conditions. Overby said he would talk to Cobb.

On July 17 the Company held a safety meeting at which time the employees were asked to vote on whether they wanted to work a 10-hour-per-day shift or a 12-hour-per-day shift with overtime being paid after 12 hours instead of 10 hours. All the men, including Cobb, voted for the 12-hour shift. The Company took no position because it didn't care one way or the other. The company wanted to get 50 hours per week worked. If they could do it in 5 days or less that's what they would do. If they could not, Saturday would be a makeup day. All employees were paid overtime for hours worked in excess of 40 per week. Thus most employees were receiving overtime anyway.

On July 20, Cobb told Browning that he wanted to change the overtime hours from what the men had agreed to back to 10-hour daily shifts. And that he wanted to be paid for showup time even though employees didn't start work because of bad weather. Cobb told Browning that his back problems were confidential and none of Bowles business. He accused Browning of holding a grudge against him because he was not getting as many hours in a week as other employees. Cobb told Browning that he could be his friend or his enemy in a rude and threatening tone which made Browning feel personally threatened by him. At the end of the conversation, Cobb stated that he didn't want a change in overtime hours.

Although Cobb did not complain about overtime hours after July 20, he repeatedly complained about being sent home on bad weather days while other men remained on the job. According to Browning, employees who remained at work on rain days were picked in accordance with contract seniority provisions. On July 27, Browning told Bowles that he was having trouble with Cobb. He was hateful, threatening, and constantly complaining. Bowles said that since he was probationary, dismiss him. On July 30 Browning told Bob Orders, Jr. the same thing.

On July 31, Browning dismissed Cobb for being rude, disrespectful, threatening, and constantly complaining. Cobb wanted to know whose's idea it was to fire him. Browning said it didn't matter. Cobb then used rude and foul language toward Browning.

The above company witnesses testified that they never require employees to remain on the job during bad weather, so they never pay the 2 hours' guarantee. They testified that the

men prefer working as many hours in a day as possible so that they can travel to their homes on the weekends and avoid motel bills. They also testified that they have been unionized for a long time and did not discharge Cobb because of his alleged union activity. They did not consider any of his actions as union activity.

Four employees testified that a safety meeting was held on July 17 wherein a vote was taken on whether to work a 10-hour daily shift or a 12-hour daily shift with overtime being paid after those hours. At the meeting Cobb first disagreed with the 12-hour shift but the vote was unanimous because the employees didn't like working on weekends. This decision was left entirely up to the men on the job. The Union and the Company took no position. The company didn't care how the men decided on shift hours as long they all agreed one way or the other. They testified that in inclement weather, the company never required that employees stay on the job unless asked, and never paid employees for showing up.

Robert Sloan testified that Cobb, Browning and Bill Miller were talking about switching hours back to 10 per day when he said it didn't matter to him. In employee David McGlothlin's presence Cobb told Sloan to shut up his damn mouth, it was none of his business.

Analysis and Conclusions

After a review of all the evidence, I can not find that Milton Cobb was discharged for engaging in union activity. He complained about contract provisions and he complained about being sent home during bad weather and many other things. In effect Cobb complained about provisions agreed to by the Union and the Company, including the seniority provisions. He also objected to the agreement among the employees, to which he consented, which was sanctioned by the Union and the Company.

Cobb stated that he didn't remember the meeting at which the vote was taken but I discredit him on this and all other aspects of his testimony because his testimony was refuted by so many other witnesses who stated that all agreed to waive the 10-hour-per-day provision. Likewise, other aspects of Cobb's testimony are not credited because it it refuted by more credible testimony and because he had a lapse of memory or was very selective in what he stated. Miller's testimony is discredited because it is inconclusive and refuted by all other witnesses.

The Company has been unionized for years and has a good working relationship with the Steelworkers and I credit the testimony of all the witnesses who stated that the Company was neutral in the selection of shift hours. In short, I find no antiunion motive in the discharge of Cobb.

General Counsel argues that Cobb may have been discharged because of his protected concerted activities. I find that Cobb's activities were not concerted because he was complaining on behalf of himself. In fact, his complaints were against the interests of all the other employees. Neither can I find that Cobb was attempting to enforce the terms of the contract. The evidence supports a finding that the company was following the terms of the contract and Cobb knew this. What seemed to displease Cobb among other things was the fact that other employees were working more hours than he even, although, the Company was following the company seniority provisions. In my opinion, this does not equate with asserting a contract provision which is being violated.

The entire record indicates that the employees, Company, and Union were working in harmony with the exception of Cobb. He arrived on the job with a bad attitude which persisted from his first day of work until his last. Moreover, I find that the Company satisfied its *Wright Line* burden by providing many instances of misconduct, bad attitude, and disruptive behavior on Cobb's part which justified his discharge as a probationary employee.

Accordingly, I will recommend dismissal of the allegations in this complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any violations of Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.